

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MM Docket No. 96-116

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of
HOMETOWN MEDIA, INC.

DOCKET FILE COPY ORIGINAL

) File No. BR-950601B9
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For Renewal of License
for Station WAYB(AM)
Waynesboro, VA

ORIGINAL

To: Administrative Law Judge Joseph Chachkin

SUPPLEMENT TO MOTION FOR SUMMARY DECISION

Hometown Media, Inc. ("Hometown"), by and through counsel and pursuant to Section 1.251 of the Commission's Rules, 47 C.F.R. §1.251, hereby submits this Supplement to Motion for Summary Decision seeking summary resolution of the issues designated against Hometown in the Hearing Designation Order, DA 96-813, released May 22, 1996 ("HDO"). This supplement is intended to address certain matters raised by the Presiding Judge at the pre-hearing conference held on July 16, 1996, to wit: how the licensee, Hometown, intends to return the station to the air expeditiously.

1. Attached hereto are statements made under penalty of perjury from all of the parties to this transaction. First, Mr. Phillip Showers, President of Hometown explains why he was unable to return the station to the air sooner. Thus, he states that he lost title to all of the equipment and has been negotiating the sale, first with the station's creditor, Mr. Ken Edwards, and then with Randall Fields and Brenda Merica, since that time. Mr. Showers states that the parties have reached an agreement to sell the station to Valley

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Communications L.C. ("Valley"), a Virginia limited liability company established by Brenda Merica and Randall Fields for that purpose. The parties have also reached an agreement to permit Hometown to place the station back on the air within ninety days. See also, Statements of Randall Fields and Ken Edwards.

2. Under this agreement, Mr. Edwards will lease all of the broadcast equipment to Hometown to return the station to the air for a term of one year, which is renewable, or until the assignment of license to Valley is approved. Mr. Edwards will also make the studio site available pursuant to a lease. Hometown already has a lease for the tower site with the city which remains in effect. Thus, Hometown will have all of the equipment it needs to operate pursuant to the lease from Mr. Edwards.

3. In addition, Hometown will employ Mr. Randall Fields as General Manager. Mr. Showers has discussed programming and format with Mr. Fields and Mr. Fields has lined up certain employees to work for the station. Hometown will enter into a Local Marketing Agreement ("LMA") with Valley which will also have a term of one year, renewable, or until the assignment of license to Valley is approved. In the event the assignment is not approved for some reason, the equipment lease and the LMA will continue in effect for a year, initially, with an option to renew. In any event, the station will remain on the air.

4. The Commission has approved a similar arrangement in a similar situation. Thus, in American Music Radio, 10 FCC Rcd 8769 (1995), the Commission was faced with the

following:

KHYM went dark after AMR lost its transmitter site and broadcasting equipment in foreclosure proceedings in June 1992. In contemplation of a proposed station sale, AMR [the licensee and assignor] entered into two agreements with the proposed assignee, KHYN, Inc. On August 5, 1992, pursuant to a Construction and Rental Agreement, KHYM, Inc., agreed to construct technical and studio facilities for KHYM, and thereafter to lease the facilities to AMR for a monthly rental fee. On December 1, 1992, AMR and KHYM, Inc., entered into a Program Service Agreement, whereby KHYM, Inc. agreed to provide AMR with programming and to broker substantially all of KHYM's air time in exchange for a monthly fee paid to AMR.

American Music Radio, ¶ 5. The Commission affirmed a staff ruling which denied a petition to deny the assignment application of AMR to KHYM, Inc., alleging, inter alia, an unauthorized transfer of control evidenced by the above agreements. Id. The parties here are in a similar situation and are proposing a similar solution. The licensee will lease the equipment, not from Valley, the proposed assignee, as in the AMR case, but from a separate party, Mr. Edwards. The licensee will also enter into an LMA with the assignee, just as the licensee in the AMR case. In sum, the arrangement that the parties are proposing has passed Commission muster. In the event there are allegations of unauthorized transfer of control, which are not part of this proceeding, any such issues can be raised in the context of the assignment application. However, there is no reason to anticipate such problems.

5. Significantly, all of the parties acknowledge that Hometown, the licensee, will return the station to the air and will retain full and complete control over station operation

until the FCC approves the assignment of the license to another entity. It is also significant that the agreements described in the attached statements will inure to the benefit of all of the parties and the public interest. Mr. Showers, President of the licensee, will be able to return the station to the air forthwith and will be able to sell an operating station to Valley. Mr. Edwards, by assisting with the return of the station to the air, will also facilitate the sale to Valley and the payment of outstanding liabilities. Valley will be able to effectuate its purchase agreement upon FCC approval. And finally, the City of Waynesboro and the local citizenry will benefit with the expeditious return of a local broadcast service. See Statement of the Schuyler M. Giles, City Manager of the City of Waynesboro submitted with original motion for summary decision.

6. The expeditious return of the station is also assured by the conditional grant of the renewal which is contemplated in the HDO, ¶ 4, which reads

4. IT IS FURTHER ORDERED, that, in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation, the precise period of time to be established in the hearing. Failure to resume operations within the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

7. It is submitted, that, Summary Decision is appropriate under the unique circumstances of this case. There remain no genuine issues of fact regarding the licensee's admitted violation of Sections 73.1740 and 73.1750 of the rules.

Although no case directly in point has been found, the admitted failure to extend the authority to remain silent for three months should not warrant the denial of a license renewal or further hearing.^{1/} With regard to the issue of whether the station will be returned to the air expeditiously, the parties have set forth their plans. All have agreed to cooperate in placing Hometown in a position to expeditiously return the station to the air. Moreover, the HDO authorizes the Presiding Judge to so condition the renewal.

8. Under these circumstances, a hearing would serve no useful purpose and a summary decision in the licensee's favor would serve the public interest, convenience and necessity. This procedure will conserve the resources of the parties and permit them to expend these resources on returning the station to the air. The resources of the Commission will also be conserved and at the same time the Commission will have the assurance that the station will return to the air within ninety days and, if not, the license will be cancelled and the call letters will be deleted.

Respectfully submitted,
HOMETOWN MEDIA, INC.

By:  William D. Silva

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July 17, 1996

^{1/} Attached is a Summary Decision which was granted in a similar situation. It differs from the instant case, however, in that the time broker in that proceeding was not proposing to purchase the station once it was returned to the air.

STATEMENT OF PHILLIP C. SHOWERS

I, Phillip C. Showers, hereby state under penalty of perjury that:

1. I am President of Hometown Media, Inc. ("Hometown"), licensee of Station WAYB-AM, Waynesboro, Virginia. As I have already stated, I have been negotiating with Randall Fields and Brenda Merica to sell them the station since August 1995. I had originally intended to sell the station to Mr. Ken Edwards and a group of local businessmen, but they agreed to step aside when Mr. Fields and Ms. Merica, both experienced broadcasters, expressed an interest in the station. I would have returned WAYB to the air sooner, but it has taken this long to work out the details of the sale to Valley Communications L.C. ("Valley") and the agreements described herein. In the interim, I had lost title to all of the equipment and was not in a position to resume service.

2. Phillip Showers, Ken Edwards, Brenda Merica and Randall Fields have reached an agreement pursuant to which Hometown will place Station WAYB back on the air within ninety days of the grant of the renewal. This agreement involves the following.

3. Ken Edwards holds legal title to all of the broadcast equipment of Station WAYB including program origination equipment, transmission equipment, antenna, tower and all other equipment necessary to put the station back on the air. Mr. Edwards has agreed to lease all of this equipment and a studio location to Hometown. Hometown holds a lease with the city of Waynesboro for the land on which the tower is located. Hometown will employ Randall Fields as General Manager and will enter into a Local Marketing Agreement ("LMA") with Valley whereby Valley will operate the station subject to the ultimate control of Hometown. The term of the LMA will be one year, with an option to renew, or when the FCC approves the assignment of the license to Valley, whichever occurs first. In the event the assignment to Valley is not granted for whatever reason, Hometown will continue to operate the station under the equipment lease and the LMA referenced above. The terms of these agreements will be for a year, initially, with an option to renew.

5. Hometown, under these agreements, will be able to return the station to the air in ninety days. Mr. Showers has discussed the format with Mr. Fields and the format to be utilized will be similar to that previously utilized by the station. There will also be a strong emphasis on local news, local sports and local community events. Mr. Fields will be employed by Hometown as the General Manager and he, in turn, has identified other employees and determined that they would be available, including sales personnel and programming staff members within the allotted time.

6. I understand that Hometown is the licensee of the station and must retain ultimate control and authority over station operations and that under the agreements, Hometown would remain licensee until the FCC approves the assignment of the license to another entity.

Phillip C. Showers
Phillip C. Showers

7-17-96

STATEMENT OF RANDALL FIELDS

I, Randall Fields, hereby state under penalty of perjury that:

1. I am a principal of Valley Communications L.C. ("Valley"), a Virginia limited liability company which was formed six months ago for the purpose of operating broadcast stations. Brenda Merica and I each own fifty percent of Valley. As I have already stated, we have been negotiating with Phillip Showers, President of Hometown Media, Inc. ("Hometown") licensee of Station WAYB-AM, and Ken Edwards, a creditor of Hometown, to acquire the station.

2. Phillip Showers, Ken Edwards, Brenda Merica and Randall Fields have reached an agreement pursuant to which Hometown will place Station WAYB back on the air within ninety days of the grant of the renewal. This agreement involves the following.

3. Ken Edwards holds legal title to all of the broadcast equipment of Station WAYB including program origination equipment, transmission equipment, antenna, tower and all other equipment necessary to put the station back on the air. Mr. Edwards has agreed to lease all of this equipment and a studio location to Hometown. Hometown holds a lease with the city of Waynesboro for the land on which the tower is located. Hometown will employ Randall Fields as General Manager and will enter into a Local Marketing Agreement ("LMA") with Valley whereby Valley will return the station to the air and operate it subject to the ultimate control of Hometown. The term of the LMA will be one year, with an option to renew, or when the FCC approves the assignment of the license to Valley, whichever occurs first.

4. Valley's intention is to obtain FCC approval to become the licensee of Station WAYB-AM at the earliest possible date. In this connection, it has prepared an FCC Form 314 which is complete and ready to file including exhibits whenever such filing is deemed appropriate. In the event the assignment to Valley is not granted for whatever reason, Hometown will continue to operate the station under the equipment lease and the LMA referenced above. The terms of these agreements will be for a year, initially, with an option to renew.

5. Hometown, under these agreements, will be able to return the station to the air in ninety days. Mr. Showers has discussed the format with Mr. Fields and the format to be utilized will be similar to that previously utilized by the station. There will also be a strong emphasis on local news, local sports and local community events. Mr. Fields will be employed by Hometown as the General Manager and he, in turn, has identified other employees and determined that they would be available, including sales personnel and programming staff members within the allotted time.

6. I understand that Hometown is the licensee of the station and must retain ultimate control and authority over station operations and that under the agreements, Hometown would remain licensee until the FCC approves the assignment of the license to another entity.

Randall L. Fields
Randall Fields

7-16-96

Statement of Kenneth Edwards

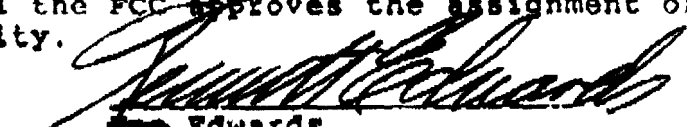
I, Ken Edwards, hereby state under penalty of perjury that:

1. I am a local businessman located in Waynesboro, Virginia. I am a creditor of Hometown Media, Inc. ("Hometown"), licensee of Station WAYB-AM, Waynesboro, Virginia. As such, I have legal title to all of the equipment used and useful to Hometown in operating the station. Sometime prior to June 1995, I was negotiating with Phillip Showers to acquire the station and place it back on the air. It is my view that Waynesboro needs this station. When Brenda Merica and Randall Fields expressed an interest in buying the station, I stepped aside and support their efforts. They are experienced broadcasters and local residents and they have formed Valley Communications L.C. ("Valley") with the purpose of seeking FCC approval to acquire the license.

2. Phillip Showers, Ken Edwards, Brenda Merica and Randall Fields have reached an agreement pursuant to which Hometown will place Station WAYB back on the air within ninety days of the grant of the renewal. This agreement involves the following.

3. Ken Edwards holds legal title to all of the broadcast equipment of Station WAYB including program origination equipment, transmission equipment, antenna, tower and all other equipment necessary to put the station back on the air. Mr. Edwards has agreed to lease all of this equipment and a studio location to Hometown. Hometown holds a lease with the city of Waynesboro for the land on which the tower is located. Hometown will employ Randall Fields as General Manager and will enter into a Local Marketing Agreement ("LMA") with Valley whereby Valley will return the station to the air and operate it subject to the ultimate control of Hometown. The term of the LMA will be one year, with an option to renew, or when the FCC approves the assignment of the license to Valley, whichever occurs first. In the event the assignment to Valley is not granted for whatever reason, Hometown will continue to operate the station under the equipment lease and the LMA referenced above. The terms of these agreements will be for a year, initially, with an option to renew.

4. I understand that Hometown is the licensee of the station and must retain ultimate control and authority over station operations and that under the agreements, Hometown would remain licensee until the FCC approves the assignment of the license to another entity.


Ken Edwards
KENNETH

7.16.96

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-298

In re Application of

DAVID LEE
COMMUNICATIONS, INC.

File No. BR-890602UJ

For Renewal of License
of Station WTRX(AM),
Flint, Michigan

Appearances

Arthur V. Belendiuk, on behalf of David Lee Communications, Inc.; and James W. Shook, on behalf of the Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 25, 1994;

Released: March 31, 1994

PRELIMINARY STATEMENT

1. The *Hearing Designation Order* (HDO) issued by the Chief, Audio Services Division, Mass Media Bureau, specified the following issues against David Lee Communications, Inc. (Lee).

(a) To determine whether David Lee Communications, Inc. has the capability and intent to expeditiously resume broadcast operations of WTRX(AM) consistent with the Commission's Rules.

(b) To determine whether David Lee Communications, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

8 FCC Rcd 8412 (MMB 1993).

2. On March 1, 1994, Lee filed a motion for summary decision seeking resolution of the designated issues in favor of Lee. On March 15, 1994, the Bureau filed comments and a counter-motion for summary decision. The Bureau

agrees with Lee that summary decision is appropriate. It urges, however, that Lee violated Section 73.1740 of the Rules and that an appropriate sanction is grant of renewal of Lee's license for a short term to end October 1, 1995, one year before the term would ordinarily end. Lee does not oppose the request for a short term renewal.¹

FINDINGS OF FACT

3. The basic facts are not in dispute. Lee became licensee of Station WTRX(AM) on June 2, 1989, pursuant to an assignment of license (See File No. BAL-890210EB). On June 2, 1990, Lee filed its application for renewal of license. While its renewal application was pending, Lee ceased broadcast operations on Station WTRX(AM) on August 20, 1990. On September 10, 1990, Lee requested authority to suspend its operations, citing financial difficulties. Motion for Summary Decision, Exhibit 1, p. 1. By letter dated October 29, 1990, Lee was granted special temporary authority to remain silent through November 30, 1990. Thereafter, shortly before its authority to remain silent expired, Lee periodically submitted requests for continued authority to remain silent. See Attachments A through D; Motion for Summary Decision, Exhibit 1, pp. 3-4. Generally, the staff granted Lee's requests within a few weeks of their submission. See attachments E and F; Motion for Summary Decision, Exhibit 1, p. 5.

4. On December 18, 1992, Lee again requested an extension of its authority to remain silent. Lee related that it was "still in the process of working on the financial aspect of returning" its station to the air and that it was "currently negotiating with several investors ... to provide the necessary funding ..." Motion for Summary Decision, Exhibit 1, pp. 7-8. Lee's request was granted by letter dated January 29, 1993. Therein, Lee was advised that any further requests for authority to remain silent "must be accompanied by a detailed summary of steps taken to return the station to on-air operations." Motion for Summary Decision, Exhibit 1, p. 9.

5. On April 13, 1993, Lee submitted its final request for authority to remain silent. Motion for Summary Decision, Exhibit 1, pp. 10-11. Except for the date, Lee's letter was identical to its letter of December 18, 1992. By letter dated April 30, 1993, the staff found Lee's letter insufficient to warrant any further extension of its authority to remain silent, and gave Lee 30 days in which to provide a "detailed explanation of the specific steps you have taken and plan to take to return your station to the air. This may include, but is not limited to, a marketing plan, proof of listing with a broker, a list of prospective investors or buyers contacted and all other positive efforts made to sell the station." Motion for Summary Decision, Exhibit 1, pp. 12-13.

6. Lee's late filed response, dated June 3, 1993, enclosed a bank commitment letter and related that Lee was "currently in the process of negotiating a merger with a local station which we expect would ... put the station back on air in a relatively short period of time." Motion for Summary Decision, Exhibit 1, p. 14. However, the commitment letter said nothing about providing funds for resumption of

¹ On March 16, 1994, Lee filed a Reply to the Bureau's Comments. Section 1.25 of the Rules does not provide for the filing of a Reply. However, Lee's pleading will be treated as a response to the Bureau's counter-motion.

² A staff letter, which granted Lee's September 15, 1992, request, was virtually identical to the staff's January 29, 1993, letter. See Motion for Summary Decision, Exhibit 1, pp. 6 and 9; and Attachment D.

broadcast operations on Station WTRX(AM) and it did not indicate how much money, if any, would be left after payment of an existing debt. Moreover, the commitment letter expressly stated that it would expire at the bank's option if, among other things, the loan was not closed on or before June 1, 1993. Attachment G. Lee's June 3, 1993, letter to the Commission neither stated that the loan had closed nor gave any hint as to when the closing would occur. The Commission heard nothing further from Lee until its late-filed notice of appearance in this proceeding.

7. On January 19, 1994, Lee and Saginaw Bay Broadcasting Corporation (SBBC), licensee of Station WMAX(AM), Bay City, Michigan, entered into a time brokerage agreement, whereby SBBC would provide programming for Station WTRX(AM). Motion for Summary Decision, Exhibit 2. On January 27, 1994, Lee filed a request for special temporary authority to resume broadcasting on Station WTRX(AM). Authority to operate was granted by letter dated January 28, 1994. Motion for Summary Decision, Exhibit 1, p. 15. Lee resumed broadcasting on Station WTRX(AM) on February 2, 1994. In the event the time brokerage agreement expires or is terminated for any reason, David Lee Scheurer, Lee's president and sole shareholder, has committed to invest personal funds to provide for the station's continued operation. Motion for Summary Decision, Exhibit 4.

CONCLUSIONS

8. Section 1.251 of the Commission's Rules provides for summary decision where there is no genuine issue of material fact for determination at hearing. *New Broadcasting Corp.*, 44 FCC 2d 386 (1973). A request for summary decision requires a showing that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 50 FCC 2d 967 (1975). The Presiding Judge agrees with the parties that there is no genuine dispute as to any material fact and that disposition by summary decision is appropriate.

9. Issue (a) seeks to determine whether Lee has the capacity and intent to resume broadcast operations. Since the HDO's release, WTRX(AM) has commenced regular broadcast operations. WTRX(AM) is currently operating pursuant to the terms of its Time Brokerage Agreement. The Agreement is for a term of one year with SBBC having the option to renew the Agreement for up to two additional one year terms. David Lee Schuehrer, President and sole shareholder of Lee is committed to keeping WTRX(AM) on the air. Should SBBC fail to renew the Agreement for an additional term or not perform pursuant to the terms of the existing Agreement, Schuehrer has committed to personally finance the continue operation of the station. Considering that WTRX(AM) is currently on the air and appears likely to remain so, issue (a) is resolved in Lee's favor.

10. Issue (b) calls for a determination whether Lee violated Sections 73.1740 and/or 73.1750 of the Commission's Rules. With respect to the latter Rule, Section 73.1750 requires that a licensee notify the Commission of its intent to permanently discontinue operation. The evidence makes clear that Lee never intended a permanent discontinuance of operations of WTRX(AM). Accordingly, Lee did not violate Section 73.1750.

11. Section 73.1740 of the Commission's Rules prescribes minimum operating schedules for commercial broadcast licensees. Among other things, the rule requires that, if a licensee is going to keep its station off the air for more than 30 days, it must obtain authorization from the Commission to do so. Section 73.1740(a)(4). Commission authority to operate less than the minimum required by Section 73.1740 is conferred by a grant of special temporary authority pursuant to Section 73.1635 of the Commission's Rules.

12. As noted, between August 20, 1990 and the issuance of the HDO, Station WTRX(AM) was off the air. Prior to April 29, 1993, the Commission had granted Station WTRX(AM) authority to remain silent. However, on April 30, 1993, the Commission notified Lee that its April 13, 1993, request for continued authority not to operate Station WTRX(AM) was insufficient to justify an extension of special temporary authority to remain silent. The Commission gave Lee a deadline of June 1, 1993, to submit any further request and informed Lee what such a request must include. However, Lee's June 3, 1993, letter was neither timely nor responsive. Under the circumstances, Lee had no valid reason for believing that Station WTRX(AM) had continued authority to remain silent or that its request for such authority would be granted *nunc pro tunc*. Hence, Lee's reliance on 5 U.S.C. Section 558(c)(2) is misplaced. In this regard, Lee did not lose its license. Rather, it simply did not receive a grant of a request for special temporary authority to remain silent. See Section 73.1635 of the Commission's Rules. By its very nature such authority is special and temporary. It does not confer upon a licensee the rights attendant to a permit or license and may be cancelled without prior notice or right to hearing. See Section 73.1635(b). In short, absent an express declaration by the Commission that Lee had continued authority not to resume broadcast operations, it had no such authority. Moreover, Lee's letters of April 13, 1993, and June 3, 1993, did not confer upon Lee authority to keep Station WTRX(AM) off the air nor did they revive any authority which had been previously granted but had since expired. Accordingly, Lee violated Section 73.1740, of the Commission's Rules.

13. In summary, issue (a) has been resolved in favor of Lee. With respect to issue (b), Lee did not violate Section 73.1750 of the Rules. As discussed, *supra*, Lee did violate Section 73.1740 of the Rules. While a sanction is called for, the Presiding Judge agrees with the Bureau that the imposition of a forfeiture would be counter-productive since Lee's financial condition contributed to its prolonged silence. As suggested by the Bureau, the public interest would be better served by a short term renewal of Lee's license. The Bureau's recommendation that renewal of Lee's license should be for a period ending on October 1, 1995, one year before the term would ordinarily end, is adopted.

Accordingly, IT IS ORDERED, That the Countermotion For Summary Decision filed by the Mass Media Bureau on March 15, 1994 IS GRANTED; That the Motion For Summary Decision filed March 1, 1994 by David Lee Communications, Inc. IS DISMISSED as moot; and that the

application for renewal of license of David Lee Communications, Inc. IS GRANTED for a short term ending October 1, 1995.³

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

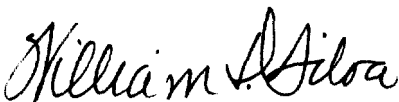
³ In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision

shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1276(d).

Certificate of Service

I, William D. Silva, certify that on this 17th day of July, 1996, I have hand delivered a copy of the foregoing SUPPLEMENT TO MOTION FOR SUMMARY DECISION:

Alan E. Aronowitz, Esquire
Robert Zauner, Esquire
Complaints and Political Programming Branch
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Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554


/s/ William D. Silva
William D. Silva